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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ADRIENNE AKINSETTE, an individual,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.;
REGIONAL TRUSTEE SERVICES
CORPORATION; Does 1-10,

Defendants.

Case No. 5:14- CV- 03947- EJD

Hon. Edward J. Davila
Dept. 4

**PLAINTIFF'S OPPOSITION TO
DEFENDANT WELLS FARGO
BANK N.A.'S MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

DATE: January 30, 2015

TIME: 9:00 AM

CTRM: 4 (5th Floor)

Complaint filed: July 28, 2014

Notice of Removal Filed: August 29,
2014

Trial Date: Not set

1 Plaintiff ADRIENNE AKINSETE (“Plaintiff”) by and through her attorneys of
2 record hereby opposes Defendant WELLS FARGO BANK, N.A.’s (“Defendant”)
3 Motion to Dismiss the First Amended Complaint, on the grounds that the Complaint
4 sufficiently pleads facts in support of Plaintiff’s claim as required by Federal Rule of
5 Civil Procedure 12(b)(6).

6 This opposition is based on the First Amended Complaint, the records on file in
7 this action, and any further briefs, evidence, authorities or arguments presented at or
8 before the hearing on this Motion.

9
10 November 3, 2014

BERGMAN & GUTIERREZ LLP

11
12 By: /s/ Amanda L. Gray
13 Penelope P. Bergman
14 Deborah P. Gutierrez
15 Amanda L. Gray
16 Attorneys for Plaintiff,
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MEMORANDUM ON POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Adrienne Akinsete (“Plaintiff”) asserts claims against Defendant Wells Fargo Bank, N.A. (“Wells Fargo” or “Defendant”), for its negligent and deceptive mishandling of her loan modification. Specifically, Plaintiff asserts that Defendant engaged in unlawful conduct when it made recurrent misrepresentations about her loan modification application, including that it was reviewing her for its available modification programs, while simultaneously dual-tracking her in foreclosure. Not only is Defendant’s conduct in direct violation of California’s Home Owner’s Bill of Rights, its recurrent false representations have caused Plaintiff substantial harm, including loss of her opportunity to pursue other loss mitigation alternatives. Plaintiff does *not* allege Defendant was required to offer, consider or approve a loan modification if she did not qualify for one (which she did). Rather, Defendant owed her a duty not to misrepresent the truth in the context of loan modification negotiations.

Rather than address Plaintiff’s factual allegations, Defendant spends much of its Motion attempting to distract the Court with a preemption argument. Recent decisional authority makes clear that The Home Owner’s Loan Act (“HOLA”) preemption is not absolute and HOLA does not apply to Wells Fargo under the circumstances of this case. *See Rijhwani v. Wells Fargo Home Mortgage, Inc.*, No. C 13-05881 LB, 2014 WL 890016, *6 (N.D. Cal., Mar. 3, 2014).

For purposes of a Motion to Dismiss, Plaintiff has stated each of her claims, and Defendant’s Motion should be denied in its entirety.

II. LEGAL STANDARD

The standard for dismissal under Rule 12(b)(6) is a stringent one. “[A] complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Cervantes v. City of San Diego*, 5 F.3d 1273,

1 1274 (9th Cir. 1993) (emphasis added). The complaint must be construed in the light
 2 most favorable to the nonmoving party and its allegations taken as true. *See Scheuer v.*
 3 *Rhodes*, 416 U.S. 232, 236 (1974). The U.S. Supreme Court has held that to survive a
 4 motion to dismiss, a complaint must contain sufficient factual matter which, ***accepted as***
 5 ***true***, would “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*
 6 *Twombly*, 55 U.S. 544 (2007).

7 A motion to dismiss pursuant to Rule 12(b)(6) is *not* a procedure for resolving
 8 contested facts or the merits of the case. “[S]o long as the plaintiff alleges facts to
 9 support a theory that is not facially implausible, [a] court’s skepticism is best reserved
 10 for later stages of the proceedings when the plaintiff’s case can be rejected on
 11 evidentiary grounds.” *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1057
 12 (9th Cir. 2008).

13 **III. STATEMENT OF FACTS**

14 At all relevant times, Wells Fargo has been the servicer of Plaintiff’s mortgage
 15 loan (“Loan”). (FAC, ¶4).

16 Wells Fargo advertises that it has “multiple loan modification programs available”
 17 for borrowers in different situations, which are “meant to help people keep their homes”
 18 and invites borrowers to apply. (FAC, ¶5). Pursuant thereto, on or around May 22,
 19 2014 with the assistance of a third party representative, Plaintiff submitted a complete
 20 loan modification application to Wells Fargo. (FAC, ¶6).

21 On or around June 4, 2014, Plaintiff received Wells Fargo correspondence dated
 22 May 26, 2014 (Memorial Day), acknowledging receipt of Plaintiff’s loan modification
 23 application, and requesting additional information to “help [it] better understand
 24 [Plaintiff’s] financial situation.” Wells Fargo misrepresented to Plaintiff that she had
 25 until August 24, 2014 to provide the additional information. (FAC, ¶7). Although
 26 Plaintiff promptly complied with each of Wells Fargo’s additional/supplemental
 27 requests for information (FAC, ¶8), on June 9, 2014, Wells Fargo advanced foreclosure
 28 proceedings by filing a Notice of Trustee’s Sale. (FAC, ¶9).

1 On July 1, 2014, Plaintiff's representative sent a letter via facsimile to Wells
2 Fargo's agent and the foreclosing trustee, Regional Trustee Services Corporation,
3 placing Wells Fargo and Regional Trustee on notice that any trustee's sale would
4 constitute a violation of California's Home Owner's Bill of Rights. (FAC, ¶10).

5 Shortly thereafter, on or around July 22, 2014, Defendant denied Plaintiff for a
6 "proprietary step rate program" modification on the basis that Plaintiff's "financial
7 situation shows that [she] ha[s] the ability to make [her] mortgage payment." (FAC,
8 ¶11).¹ Defendant further falsely represented to Plaintiff that it "moved to evaluate [her]
9 for the next available program based on [the] information and the qualifications
10 associated with [her] loan." (FAC, ¶12). To date, Defendant has not provided any
11 information further describing the "next available program" or the steps necessary for
12 Plaintiff to be considered for the "next available program," and there has been no
13 decision on its purported evaluation of the "next available program." (FAC, ¶12).

14 In order to prompt Defendant for the further review, Plaintiff submitted an appeal
15 form that had been provided by Defendant and requested that Defendant provide
16 information pertaining to the "next available program(s)." (FAC, ¶13). On or around
17 August 28, 2014, Defendant sent a form letter, falsely representing to Plaintiff that after
18 "carefully reviewing the information we currently have," we have determined that you
19 still do not meet the requirements for a loan modification. To date, Defendant has failed
20 to provide any clarification as to the basis for the denial or any response as to its
21 purported review of its available modification programs. (FAC, ¶14).

22 Defendant's wrongful conduct has been specifically outlawed by the legislature
23 through the Homeowner's Bill of Rights. Specifically, Wells Fargo dual tracked
24 Plaintiff's Loan by recording a Notice of Trustee's Sale while Plaintiff's loan
25

26 ¹ Defendant's decision on the "step rate" modification has been subsequently
27 contradicted by Defendant's agent, which now claims Plaintiff would not be able to
28 qualify for a modification based on her inability to afford a modified payment. Plaintiff
requests leave to amend, if necessary, to add additional facts pertaining to Defendant's
purported modification review.

1 modification application was pending, and has continued to dual track Plaintiff's Loan
 2 without providing Plaintiff a written determination of her loan modification application.
 3 (FAC, ¶15).

4 As a result of Wells Fargo's misconduct, Plaintiff has suffered damages including
 5 improper assessment of interest, late fees, foreclosure fees and other improper amounts;
 6 damage to her credit; protracted financial and emotional distress; inability to obtain loss
 7 mitigation assistance for which she qualified; and other monetary loss. (FAC, ¶16).

8 **IV. LEGAL ARGUMENT**

9 **A. HOLA Preemption Does Not Apply**

10 Wells Fargo urges the Court to analyze preemption of Plaintiff's state law claims
 11 under the Home Owners Loan Act ("HOLA") and its attendant Office of Thrift
 12 Supervision ("OTS") regulations (Motion, 2:18-14:22). This analysis is wrong for two
 13 reasons: (1) the National Banking Act, not HOLA, applies here because Wells Fargo is a
 14 national bank and Wells Fargo's only ground for preemption arises from the National
 15 Banking Act (NBA); and (2) Plaintiff's claims survive preemption even if HOLA is the
 16 correct analysis.

17 **1. The National Banking Act And OCC Regulations Are The** 18 **Proper Preemption Analysis**

19 Preemption of state law by national banks is analyzed under the OCC conflict
 20 preemption standards set forth in the NBA. *See Aguayo v. U.S. Bank, N.A.*, 653 F. 3d
 21 912, 921-22 (9th Cir. 2011). In this case, Plaintiff's Loan was originally held by World
 22 Savings Bank, which became Wachovia, which eventually merged with Wells Fargo
 23 (Motion, 3:4-10; RFJN, Ex. D). Because Wells Fargo currently holds the Loan, is
 24 directly responsible for the foreclosure process, and is a national bank, the NBA and
 25 OCC regulations apply. The fact that the Loan originated with World Savings, a federal
 26 savings association, does nothing to change this analysis.² The central allegations in this
 27

28 ² The court in *Gerber v. Wells Fargo Bank, N.A.*, criticized the cases relied on by Wells Fargo to support the claim that World Savings and Wachovia somehow bestow HOLA

1 case—Wells Fargo’s misrepresentations and noncompliance with Civil Code § 2923.6—
 2 are attributable solely to the foreclosure actions and loss mitigation activity of Wells
 3 Fargo and has nothing to do with the origination activity of World Savings. *See Gerber*
 4 *v. Wells Fargo Bank, N.A.*, 2012 WL 413997, at *4 (D. Ariz. Feb. 9, 2012). Because
 5 Wells Fargo is a national bank, regulated by the NBA and OCC, a HOLA preemption
 6 analysis is inappropriate to evaluate the type of conduct at issue. Even if Wells Fargo
 7 were correct that the preemption analysis applicable to federal savings associations is
 8 appropriate here, its reliance on the HOLA preemption standard is misplaced because
 9 Congress amended HOLA in 2011 as a part of the Dodd-Frank Wall Street Reform and
 10 Consumer Protection Act to conform HOLA preemption standards to the NBA conflict
 11 preemption standard. *See* 12 U.S.C. § 1465(a) (2012) (“Any determination by a court . .
 12 . regarding the relation of State law to [federal savings associations] shall be made in
 13 accordance with the laws and legal standards applicable to national banks regarding the
 14 preemption of State law.”).

15 2. **Plaintiff’s Claims Involving Wells Fargo’s Conduct After it**
 16 **Acquired the Loan Are Not Governed by HOLA**

17 To argue that Wells Fargo is entitled to HOLA preemption, Wells Fargo relies
 18 almost exclusively on a line of cases beginning with *DeLeon v. Wells Fargo Bank, N.A.*,
 19 729 F. Supp. 2d 1119 (N.D. Cal. 2010). The problem with this line of cases is that
 20 neither the *DeLeon* court, nor any of the subsequent courts that rely on this one decision,
 21 made any attempt at statutory analysis. *DeLeon*’s oft-quoted conclusion that “the same
 22 [HOLA] preemption analysis would apply to any alleged conduct [of a national bank]

23
 24
 25 preemption to Wells Fargo because the “cases cite either (a) nothing, (b) each other, or
 26 (c) generic statements of law about corporations succeeding to the rights of the entities
 27 they acquire.” 2012 WL 413997, at *4 (D. Ariz. Feb. 9, 2012). As the court noted,
 28 “preemption is not some sort of asset that can be bargained, sold, or transferred.” *Id.*;
See also Albizo v. Wachovia Mortg., 2012 WL 1413996, at *15 (E.D. Cal. Apr. 20,
 2012) (HOLA is not a privilege that can “trickle[...down]” to a loan’s successor in
 interest).

1 after [the bank's merger with a FSB]," cites no case law or provides any analysis.
 2 *DeLeon*, 729 F. Supp. 2d at 1126.

3 Every court that has recently analyzed the split in case law has correctly
 4 determined that post-merger conduct of a national bank is not preempted. Indeed,
 5 HOLA preemption applies "only to *conduct occurring before* the loan changed hands
 6 from the federal savings association or bank to the entity not governed by HOLA."
 7 *Rijhwani v. Wells Fargo Home Mortgage, Inc.*, No. C 13-05881 LB, 2014 WL 890016,
 8 *6 (N.D. Cal., Mar. 3, 2014); *Hixson v. Wells Fargo Bank NA*, No. C 14-285 SI, 2014
 9 WL 3870004, at *3 (N.D. Cal. Aug. 6, 2014); *Faulks v. Wells Fargo & Company*, 13-
 10 CV-02871-MEJ, 2014 WL 1922185 (N.D. Cal., May 13, 2014); *Penermon v. Wells*
 11 *Fargo Bank, N.A.*, No. 14-CV-00065-KAW, 2014 WL 2754596 (N.D. Cal., June 11,
 12 2014). As the court in *Rhue v. Wells Fargo Home Mortgage, Inc.*, 2012 WL 8303189
 13 (C.D.Cal. Nov. 27, 2012) explained:

14 The important consideration is the nature of the alleged claims that are the
 15 subject of the suit. The governing laws would be those applicable to [World
 16 Savings Bank] at the time the alleged misconduct occurred. Wells Fargo,
 17 being the successor corporation to Wachovia Mortgage and thus [World
 18 Savings Bank], succeeds to those liabilities, whatever the governing law at
 19 that time may be. Therefore, [World Savings Bank's] conduct before its
 20 merger with Wells Fargo on November 1, 2009 would be governed by
 21 HOLA where appropriate, while Wells Fargo's own conduct after that date
 22 would not.

2012 WL 8303189, at *3.

21 As articulated in *Rijhwani v. Wells Fargo Home Mortgage, Inc.*, in determining
 22 the correct preemption analysis to apply, the important consideration is not when a loan
 23 was originated, it is when the alleged misconduct occurred. *Rijhwani v. Wells Fargo*
 24 *Home Mortgage, Inc.*, No. C 13-05881 LB, 2014 WL 890016, *7 (N.D. Cal., Mar. 3,
 25 2014). Where the wrongful conduct alleged occurred after the loan changed hands from
 26 the federal savings association or bank to the entity not governed by HOLA (as is the
 27 case here), HOLA rules of preemption do not apply. *Id.* (citing *Leghorn v. Wells Fargo*
 28 *Bank, N.A.*, 950 F. Supp. 2d 1093, 1107–08 (N.D. Cal. 2013); *Corral v. Select Portfolio*

1 *Servicing, Inc.*, No. 14-CV-02251-MEJ, 2014 WL 3900023, at *4 (N.D. Cal. Aug. 7,
 2 2014); *Hopkins v. Wells Fargo Bank, N.A.*, No. 2:13-00444 WBS, 2013 WL 2253837,
 3 *3 (E.D. Cal. May 22, 2013); *Rhue v. Wells Fargo Bank, N.A.*, No. CV 12-05394 DMG
 4 (VBKx), 2012 WL 8303189, *2–3 (C.D. Cal. Nov. 27, 2012); *Rodriguez v. U.S. Bank*
 5 *Nat. Ass’n*, No. 12-00989 WHA, 2012 WL 1996929, *7 (N.D. Cal. June 4, 2012);
 6 *Gerber v. Wells Fargo Bank, N.A.*, No. 11-01083-PHX-NVW, 2012 WL 413997, *4 (D.
 7 Ariz. Feb. 9, 2012).; *Valtierra v. Wells Fargo Bank, N.A.*, No. 1:10-0849, 2011 WL
 8 590596, *4 (E.D. Cal. Feb. 10, 2011). “This is because ‘preemption is not some sort of
 9 asset that can be bargained, sold, or transferred....’” *Id.* (citing *Gerber*, 2012 WL
 10 413997, at *4).

11 Plaintiff’s claims for violation of Civil Code Section 2923.6, negligent
 12 misrepresentation and violation of Business and Professions Code Section 17200 et. seq
 13 involve wrongful conduct alleged by Plaintiff, which began in 2014, several years after
 14 Wachovia converted to a national bank, changed its name and then merged into Wells
 15 Fargo. “This means that Wells Fargo, which is not a federal savings association or
 16 bank, may not assert HOLA preemption in this particular action.” *Rijhwani*, 2014 WL
 17 890016, at *7.

18 3. The Purported Authority Cited by Defendant Does Not Support 19 HOLA Preemption

20 Wells Fargo cites a 2003 opinion letter from the OTS that provides that a New
 21 Jersey state law is partially preempted by HOLA when applied to federal savings
 22 associations. (Motion, 6:2-22; RFJN, Ex. J). However, the opinion letter was issued at
 23 the request of a federal savings association to address the question of whether federal
 24 law preempts the recently enacted law. Moreover, the letter *does not* address whether
 25 HOLA preemption applies to the actions of national banks that acquire federal savings
 26 loans, as Defendant suggests. In fact, the letter addressed the objective of HOLA
 27 preemption, stating that “Congress gave OTS, not the States, the task of determining the
 28 best practices for federal savings associations and creating uniform rules. OTS conducts

1 regular examinations of thrift lending operations for safety and soundness and
 2 compliance with established consumer protections.” (RFJN, Ex. J, p. 5). Wells Fargo is
 3 not regulated by OTS, and the OTS does not ensure Wells Fargo’s “compliance with
 4 established consumer practices.” Thus, the objective articulated in the 2003 opinion
 5 letter does not apply here. *See PENERMON*, 2014 WL 2754596 at *7.

6 Wells Fargo further contends that HOLA preempts state law on the grounds that
 7 Plaintiff agreed in the trust deed that the Loan would be governed by HOLA, whether it
 8 was held by the originating lender or its successor. (Motion, 8:21-10:6). Defendant’s
 9 position would effectively grant it blanket immunity, even though it is not a federal
 10 savings bank, by simply concluding that an automatic HOLA preemption applies to
 11 loans originated by a federal savings bank. As one court noted, “[t]o find that some
 12 homeowners cannot avail themselves of HBOR protection based solely on their original
 13 lender, and without regard to the entity engaging in the otherwise illegal conduct, is
 14 arbitrary at best, and, at worst, could result in a gross miscarriage of justice, while also
 15 running afoul of one of the original purposes of HOLA enactment: consumer
 16 protection.” *PENERMON*, 2014 WL 2754596 at *8.

17 As all of the wrongful conduct alleged by Plaintiff was done by Wells Fargo in
 18 2014, well after Wachovia merged into Wells Fargo, Wells Fargo, which is not a federal
 19 savings association or bank, may not assert HOLA preemption in this action.

20 4. **Even if HOLA were the correct analysis Plaintiff’s Claims are**
 21 **Not Preempted under HOLA**

22 Even if the HOLA applied to Plaintiff’s claims against Wells Fargo (which it does
 23 not), Plaintiff’s claims would still not be preempted. Under the HOLA, a state law is
 24 not preempted if (1) it is not listed within the express preemption clause or (2) it has
 25 only an incidental effect on lending. *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001,
 26 1005 (9th Cir. 2008) (quoting OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30,
 27 1996)). Because Civil Code § 2923.6 and Plaintiff’s related claims do not regulate
 28

servicing and only have an incidental effect on lending, the claims avoid preemption under either criteria.

a. **Plaintiff's Claims Are Not Expressly Preempted by OTS Regulations Because They Do Not Regulate Mortgage Servicing or Terms of Credit**

Because Civil Code § 2923.6 only regulates the foreclosure process, it does not fall within the express preemption categories of the OTS regulations. *See Harris v. Wells Fargo Bank, N.A.*, 2013 WL 1820003, at *5-7 (N.D. Cal. Apr. 30, 2013) (finding Civil Code § 2923.5 not preempted by HOLA); *Fernandez v. Wells Fargo Bank, N.A.*, 2012 WL 5350256, at *5-6 (N.D. Cal. Oct. 29, 2012); *Osorio v. Wells Fargo Bank*, 2012 WL 1909335, at *2 (N.D. Cal. May 24, 2012); *Pey v. Wachovia Mortg.*, 2011 WL 5573894, at *8 (N.D. Cal. Nov. 15, 2011); *Ortiz v. Wells Fargo Bank, N.A.*, 2011 WL 4952979, at *2-4 (N.D. Cal. May 27, 2011); *Shaterian v. Wells Fargo Bank*, 2011 WL 2314151, at *4, n.8 (N.D. Cal. June 10, 2010); *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 230 (2010) (holding Section 2923.5 is not preempted by HOLA because the statute only regulates the foreclosure process); *Sese v. Wells Fargo Bank Bank, N.A.*, 2013 WL 3328686 (Cal. Super. Ct. July 1, 2013) (rejecting Wells Fargo's argument that the additional remedies in Civil Code § 2923.6 warrants a different preemption analysis under *Mabry*). Section 2923.6 simply requires a mortgagee to follow certain guidelines and make a "written determination" that the modification has been approved or denied before moving forward with the foreclosure process. *See Cal. Civ. Code § 2923.6(c)(1)*. Nothing in the statute requires Wells Fargo to modify its loan origination or servicing practices outside of the foreclosure process.

Indeed, to interpret "servicing" to include "foreclosure," as Wells Fargo argues, would likely result in the preemption of every state law regarding foreclosure. *See Loder v. World Savings Bank, N.A.*, 2011 WL 1884733, at *7 (N.D. Cal. May 18, 2011). Yet "[w]ere it not for the fact that California chose to permit non-judicial foreclosures in the first place, the lender would not have that power." *Ortiz v. Wells Fargo Bank*, 2011 WL

4952979, at *3 (N.D. Cal. May 27, 2011); *see also Osorio v. Wells Fargo Bank*, 2012 WL 1909335, at *2 (N.D. Cal. May 24, 2012) (“[a] lender cannot on the one hand rely on California law as the foundation for its right to conduct a non-judicial foreclosure, while on the other hand ignore any restrictions or procedural requirements that are part of that process under California law.”). Paradoxically, a finding of preemption would leave federal savings associations with no option at all to foreclose a trust deed or mortgage. That result is inconsistent with OTS's stated objective of providing federal savings associations “maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.” 12 C.F.R. § 560.2(a); *Higley v. Flagstar Bank, FSB*, 910 F. Supp. 2d 1249, 1260 (D. Or. 2012). Such a result could not have been intended by Congress. *Id.*

b. Plaintiff's Claims Come Within the Regulation's Savings Clause

Even if Section 2923.6 regulated “servicing,” the regulation’s savings clause would still “save” it from preemption. The OTS regulation expressly exempts state real property laws from preemption as a type of law that has only an incidental effect on lending. 12 C.F.R. § 560.2(c)(2). As foreclosure on a deed of trust only concerns title to real property, foreclosure statutes such as Civil Code § 2923.6 are among the categories of laws included in the savings clause. Section 2923.6 is therefore “saved” and not preempted. *See Harris v. Wells Fargo Bank, N.A.*, No. 12-cv-05629-JST, 2013 WL 1820003, at *5-7 (N.D. Cal., Apr. 20, 2013); *Fernandez v. Wells Fargo Bank, N.A.*, No. 12-cv-03941-NC, 2012 WL 5350256, at *5-6 (N.D. Cal., Oct. 29, 2012); *Osorio v. Wells Fargo Bank, N.A.*, No. C 12-02645-RS, 2012 WL 1909335, at *2 (N.D. Cal., May 24, 2012); *Pey*, 2011 WL 5573894, at *8; *Ortiz*, 2011 WL 4952979, at *2-4 ; *Shaterian*, 2011 WL 2314151, at *4, n.8; *Mabry*, 185 Cal. App. 4th at 230.

B. Plaintiff Has Sufficiently Stated a Claim for Violation of the HBOR

The California Home Owner’s Bill of Rights (“HBOR”) “provides protections for homeowners facing foreclosure... [i]ts purpose is to ensure that homeowners are

1 considered for, and have a meaningful opportunity to obtain, available loss mitigation
 2 options such as loan modifications or other alternatives to foreclosure.” *Rijhwani*, 2014
 3 WL 890016, at *8. Specifically, the HBOR prohibits the practice commonly known as
 4 “dual tracking,” whereby financial institutions continue to pursue foreclosure while
 5 evaluating a borrower's loan modification application. *See Jolley v. Chase Home*
 6 *Finance, LLC*, 213 Cal. App. 4th 872, 904 (2013).

7 Section 2923.6 of the HBOR provides, in relevant part: “[i]f a borrower submits a
 8 complete application for a first lien loan modification offered by, or through, the
 9 borrower's mortgage servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or
 10 authorized agent to record a notice of default, notice of sale, or conduct a trustee's sale
 11 while the complete first lien loan modification application is pending” ... and until the
 12 borrower has been provided with a written determination by the mortgage servicer
 13 regarding that borrower's eligibility for the requested loan modification. Cal. Civ. Code
 14 § 2923.6(c). If a borrower is denied a first lien loan modification, the servicer must
 15 provide the reasons for the denial, and “[i]f applicable, a description of other foreclosure
 16 prevention alternatives for which the borrower may be eligible, and a list of the steps the
 17 borrower must take in order to be considered for those options. Cal. Civ. Code §
 18 2923.6(f).

19 Although Defendant confirmed that Plaintiff's loan modification application had
 20 been received and was in review, on June 9, 2014, while the application was pending it
 21 “dual tracked” Plaintiff by filing a Notice of Trustee's Sale against the Property.
 22 Despite Defendant's representations that it wanted to “help [Plaintiff] through the
 23 process,” Defendant was taking the necessary steps to conduct a trustee's sale, including
 24 filing foreclosure instruments against Plaintiff's Property in direct violation of the
 25 HBOR.

26 Defendant next denied Plaintiff for a “proprietary step rate program” however, it
 27 falsely represented to Plaintiff that it “moved to evaluate [her] for the next available
 28 program based on [the] information and the qualifications associated with [her] loan.”

1 In further violation of the HBOR, Defendant failed to provide any information
 2 describing the “next available program” or the steps necessary for Plaintiff to be
 3 considered for the “next available program,” and failed to issue any decision on its
 4 purported evaluation of the “next available program.”

5 Even after Plaintiff submitted an appeal from in an effort to prompt Defendant to
 6 complete its review of her modification application, Defendant merely responded with a
 7 generic form letter stating that it after “carefully reviewing the information we currently
 8 have,” we have determined that you still do not meet the requirements for a loan
 9 modification. To date, Defendant has failed to identify the reasons for denial of the
 10 available loss mitigation programs, and continues to advance foreclosure proceedings.

11 **1. Defendant’s HBOR Violations are Material**

12 California’s legislature has specifically outlawed Defendant’s wrongful conduct
 13 through the HBOR. Borrowers such as Plaintiff have been given an enumerated right to
 14 bring an action to enjoin such violations and/or seek monetary damages. *See* Cal. Civ.
 15 Code § 2924.12. Defendant’s violations of the HBOR are material in that they not only
 16 deprive Plaintiff of rights under California law, but deprive Plaintiff of the opportunity
 17 to pursue loss mitigation, and ultimately may lead to the loss of her home.

18 Defendant argues that Plaintiff has not sufficiently pled the materiality element of
 19 Defendant’s HBOR violations. (Motion, 15:3-16:2). However, several courts have
 20 rejected this argument. On a motion to dismiss, the court in *Withers v. J.P. Morgan*
 21 *Chase Bank N.A.*, No. C 14-0351 SBA, 2014 WL 3418367, at *5 (N.D. Cal. July 11,
 22 2014), rejected the servicer’s argument that the plaintiff could not establish requisite
 23 materiality where he alleged that: (1) the servicer filed notice of trustee’s sale while a
 24 complete loan modification application was pending, and; (2) it was made clear that
 25 foreclosure proceedings would continue despite the violation and pending modification
 26 application. *Id.* (dismissed without prejudice on other grounds). Such is precisely the
 27 case here, as Defendant has refused to provide full and fair loan modification decision
 28

on Plaintiff's pending application, and continues to pursue foreclosure.³ *See also Hixon*, 2014 WL 3870004 at *6 (court concluded that plaintiff had adequately alleged a material violation of the HBOR where the assigned single points of contact were not knowledgeable about plaintiff's situation and status); *McKinley v. CitiMortgage, Inc.*, No. 13-CV-1057 TLN-CKD, 2014 WL 651917, at *5-7 (E.D. Cal. Feb. 19, 2014) (court issued injunctive relief under the HBOR where plaintiff alleged that a notice of sale had been recorded while a complete loan modification application was pending).

2. **Plaintiff is not Stripped of her Rights under the HBOR Simply Because she is in Default**

Defendant contends that Plaintiff cannot suffer harm from the potential loss of her property, as any loss is attributable to Plaintiff's own default. (Motion, 16:10-15). Given the intent and purpose of the HBOR (to protect homeowners in foreclosure), Defendant's suggestion that Plaintiff's default somehow strips her of rights under the HBOR is illogical and perplexing. The HBOR is designed to protect those in default from the exact unfair and deceptive practices that Plaintiff has alleged here.

As Plaintiff has sufficiently alleged Defendant's repeated violations of the HBOR, Defendant's Motion to Dismiss should be denied.

C. **Plaintiff Has Sufficiently Stated a Claim for Negligent Misrepresentation**

"The elements of negligent misrepresentation are (1) the defendant made a false representation; (2) without reasonable grounds for believing it to be true; (3) with the intent to deceive the plaintiff; (4) justifiable reliance on the representation; and (5) resulting harm." *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 308 (2014) (finding allegations that defendant misrepresented its intent to permanently modify a loan, then continued with pretext that it was working to finalize the modification sufficient to allege negligent misrepresentation).

³ Sale date is currently scheduled for November 12, 2014. RFJN, Ex. A.

Defendant contends that it owes Plaintiff no duty of care. (Motion, 17:1-22). “As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089, 1095–1096, (1991). However, “[e]ven when the lender is acting as a conventional lender, the no-duty rule is only a general rule.” *Alvarez*, 228 Cal. App. 4th at 948 (citing *Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 872, 901 (2013)). To answer the question of whether a lender owes such a duty requires the balancing of an in-depth six-factor analysis, known as the ‘*Biakanja* factors.’” *Id.* (internal citations omitted). As articulated in *Nymark*:

In California, the test for determining whether a financial institution owes a duty of care to a borrower-client ‘involves the balancing of various factors among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant’s conduct and the injury suffered, (5) the moral blame attached to the defendant’s conduct, and (6) the policy of preventing future harm.’ (*Conner v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865, quoting *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.*, *supra*, 52 Cal.App.3d at pp.488-489; cf. *Gray v. Broder*, *supra*, 109 Cal.App.3d at pp.73-74.)

Nymark, 231 Cal. App. 3d at 1098. The California Supreme Court precedent cited by the *Nymark* court requires a case-by-case analysis to determine whether a duty of care arises here.

1. Application of the *Biakanja* Factors Gives Rise to a Duty of Care

Applying the test articulated in *Nymark*, California appellate courts have found the existence of a duty when a lender or servicer mishandles a loan modification application. See *Alvarez v. BAC Home Loans Servicing, L.P.*, 228 Cal. App. 4th 941, 948-949 (2014); *Jolley v. Chase Home Finance, LLC*, 213 Cal. App. 4th 827 (2013). In *Garcia v. Ocwen Loan Servicing, LLC*, 2010 WL 1881098, at *2–3 (N.D.Cal. May 10, 2010), the court found that a duty of care arose where lender misplaced documents,

1 provided conflicting information, and immediately set a sale date during the loan
 2 modification process. The court addressed the six factors in the context of mishandling
 3 documents in the loan modification process, as follows:

4 The transaction was unquestionably intended to affect Plaintiff.
 5 The decision on Plaintiff's loan modification application would
 6 determine whether or not he could keep his home. The potential
 7 harm to Plaintiff from mishandling the application processing was
 8 readily foreseeable: the loss of an opportunity to keep his home
 9 was the inevitable outcome. Although there was no guarantee the
 10 modification would be granted had the loan been properly
 11 processed, the mishandling of the documents deprived Plaintiff of
 12 the possibility of obtaining the requested relief. The injury to
 13 Plaintiff is certain, in that he lost the opportunity of obtaining a
 14 loan modification and application his home was sold. There is a
 15 close connection between Defendant's conduct and any injury
 16 actually suffered, because, to the extent Plaintiff otherwise
 17 qualified and would have been granted a modification, Defendant's
 18 conduct in misdirecting the papers submitted by Plaintiff directly
 19 precluded the loan modification application from being timely
 20 processed. The existence of a public policy of preventing future
 21 harm to home loan borrowers is shown by recent actions taken by
 22 both the state and federal government to help homeowners caught
 23 in the home foreclosure crisis.

18 *Garcia v. Ocwen Loan Servicing, LLC*, 2010 WL 1881098, at *2–3 (N.D.Cal. May 10,
 19 2010).

20 The recent California appellate decision, *Alvarez v. BAC Home Loans Servicing,*
 21 *L.P.*, 228 Cal. App. 4th 941 (2014) adopted the reasoning in *Garcia*, concluding that the
 22 **“*Biakanja* factors weigh in favor of imposing a duty of care on a lender that**
 23 **undertakes to review a loan for potential modification.”** *Alvarez*, at 948. In *Alvarez*,
 24 the plaintiffs alleged that defendants owed them a duty to exercise reasonable care in
 25 review of their modification applications once they agreed to consider them. They
 26 alleged that the defendants “breached this duty by (1) failing to review plaintiffs’
 27 applications in a timely manner, (2) foreclosing on plaintiffs’ properties while they were
 28

1 under consideration for a HAMP modification and (3) mishandling plaintiffs'
2 applications by relying on incorrect information.” *Id.* at 945. The *Alvarez* court stated:

3 We find the Garcia court’s reasoning persuasive and applicable to
4 the facts alleged in the present case. Here, **because defendants**
5 **allegedly agreed to consider modification of the plaintiffs’**
6 **loans, the *Biakanja* factors clearly weigh in favor of a duty. The**
7 **transaction was intended to affect the plaintiffs and it was**
8 **entirely foreseeable that failing to timely and carefully process**
9 **the loan modification applications could result in significant**
10 **harm to the applicants.**

11 *Id.* at 948.

12 Te appellate court in *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299 (2014)
13 rejected bank defendant’s argument that there is no duty not to misrepresent the truth in
14 the context of loan modification negotiations. *Id.* at 308-09 (finding that lenders do not
15 have a free pass to misrepresent important facts with impunity when they negotiate loan
16 modifications). Indeed, lenders have a common law duty to avoid making misleading
17 representations of material facts. *Id.* at 309 (citing *Wells Fargo Bank, N.A. v. FSI,*
18 *Financial Solutions, Inc.*, 196 Cal. App. 4th 1572-73 (2011)).

19 Here, Defendant made a series of false and negligent misrepresentations to
20 Plaintiff when it:

- 21 • advised Plaintiff on June 4, 2014 that she had until August 24, 2014 to
22 provide further financial documentation in support of her loan
23 modification, yet instead filed a Notice of Trustee on June 9, 2014, intent
24 on moving forward with foreclosure;
- 25 • advised Plaintiff that it had evaluated her for its available modification
26 program(s), when it never in fact did so;
- 27 • after Plaintiff put Defendant on notice that it had failed to render a decision
28 as to its available modification programs, it falsely advised Plaintiff that it
had “carefully reviewed the information” it had, and that she “still” did not
meet the requirements for a loan modification. (FAC, ¶32).

1 Not only did Defendant never perform an evaluation for its “available modification
 2 program(s),” it certainly did not conduct a “careful review” of any purported previous
 3 determination. (FAC, ¶33). Instead, Defendant sent a generic form denial letter to
 4 enable it to move swiftly forward with foreclosure. Defendant made these
 5 misrepresentations without any grounds for believing it would actually provide Plaintiff
 6 with a full and fair opportunity to be reviewed for a modification. Instead, Defendant
 7 led Plaintiff to believe she would be provided with a fair evaluation, and moved swiftly
 8 forward with its attempt to foreclose. Plaintiff has sufficiently pled negligent
 9 misrepresentation.

10 **D. Plaintiff Has Sufficiently Stated a Claim for Violation of Business &**
 11 **Professions Code Section 17200**

12 The UCL is codified in California Business and Professions Code section 17200
 13 (“Section 17200”). The UCL prohibits any unlawful, unfair, or fraudulent business
 14 practice. The UCL is written in the disjunctive, which means a business act or practice
 15 can be alleged to be any or all of the three prongs. *Berryman v. Merit Property*
 16 *Management, Inc.*, 152 Cal. App. 4th 1544, 1554 (2007).

17 To state a claim for fraudulent business practice under the UCL, a plaintiff does
 18 not need to establish the elements of common law fraud; rather a plaintiff need only
 19 demonstrate that the practice “is one that is likely to deceive members of the public.”
 20 *Boschma v. Home Loan Center, Inc.*, 198 Cal. App. 4th 230, 252 (2011). Defendant’s
 21 conduct of misrepresenting its intent to review Plaintiff for a modification, failing to
 22 provide Plaintiff with any proper review, and then falsely purporting that she was
 23 carefully reviewed and denied a modification, establishes a violation of Section 17200
 24 in that its actions did in fact deceive Plaintiff and led her to believe she was being given
 25 an opportunity to save her home. Plaintiff submits that Defendant never intended to
 26 review Plaintiff for modification or assist her in trying to save her home. Rather
 27 Defendant’s goal has been, and continues to be, to keep loans in default and maximize
 28 its fees. (FAC, ¶41).

1 **1. Plaintiff Has Standing Under the UCL**

2 California Business and Professions Code section 17204 requires a person to have
3 “suffered injury in fact and ha[ve] lost money or property as a result of the unfair
4 competition.” “[I]njury in fact is an invasion of a legally protected interest which is (a)
5 concrete and particularized; and (b) actual or imminent...” *Kwikset Corp. v. Superior*
6 *Court*, 51 Cal. 4th 310, 322 (2011) (internal citations omitted). The California Supreme
7 Court has established, “[t]here are innumerable ways in which economic injury from
8 unfair competition may be shown. A plaintiff may (1) surrender in a transaction more,
9 or acquire in a transaction less, than he or she otherwise would have; (2) have a present
10 or future property interest diminished; (3) be deprived of money or property to which he
11 or she has a cognizable claim; or (4) be required to enter into a transaction, costing
12 money or property, that would otherwise have been unnecessary.” *Kwikset Corp.*, at
13 323.

14 Defendant implies that Plaintiff lacks standing to assert a UCL violation because
15 there is no causal connection between Defendant’s conduct and Plaintiff’s injury.
16 (Dem., 13:14-24). Notwithstanding the loss of the opportunity to receive a fair
17 evaluation of her loss mitigation options, Plaintiff’s damages under the UCL violation
18 are not limited to the loan modification itself. Here, Plaintiff has alleged that as a result
19 of Defendant’s conduct, Plaintiff: 1) did not seek alternatives to foreclosure (such as
20 sale); (2) was assessed improper interest, late fees, foreclosure fees, and other improper
21 amounts on the Loan; (3) has suffered further damage to her credit; (5) has suffered
22 severe emotional distress; (6) lost the ability to save her home through the modification
23 she was promised; and (8) additional monetary damages. (FAC, ¶¶16, 37).
24 Accordingly, Plaintiff’s “injury” is sufficiently pled and Defendant’s standing argument
25 is without merit.
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27
28

1 **V. CONCLUSION**

2 Pursuant to the foregoing, Plaintiff respectfully requests this Court deny
3 Defendant's Motion to Dismiss in its entirety, allowing all of Plaintiff's causes of action
4 to proceed to the discovery process.

5
6 November 3, 2014

BERGMAN & GUTIERREZ LLP

7
8 By: /s/ Amanda L. Gray

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Certificate of Service

I, Amanda L. Gray, attorney of record in this matter, hereby certify that on November 3, 2014, in accordance with the registered case participants and in accordance with the procedures set forth at the United States District Court, Northern District of California, service of a true and correct copy of this document was accomplished pursuant to ECF electronic delivery.

By: /s/ Amanda L. Gray

Amanda L. Gray